TESTIMONY OF MICHAEL R. SMITH
DIRECTOR, OFFICE OF TRIBAL SERVICES
U.S. DEPARTMENT OF THE INTERIOR
AT THE HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
U.S. SENATE
ON
THE FEDERAL ACKNOWLEDGMENT PROCESS

June 11, 2002

Good afternoon, Mr. Chairman and Members of the Committee. My name is Mike Smith and I am the Director of the Office of Tribal Services (Office) within the Bureau of Indian Affairs (BIA). Accompanying me today is Mr. Lee Fleming who is the Chief of the Branch of Acknowledgment and Research (BAR) within my Office. We appreciate the opportunity to appear before you today to speak on behalf of the Department about issues that are currently impacting the Federal acknowledgment process.

The Federal acknowledgment of an Indian tribe is a serious decision for the Department and the Federal Government. It is important that a thorough and deliberate evaluation occur before we acknowledge a group's tribal status, which carries with it certain immunities and privileges. These decisions must be fact-based, equitable, and thus defensible.

HISTORY

In 1978, the Department issued regulations at 25 CFR Part 83, *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe,* to provide a uniform process for determining which groups are Indian tribes. The BAR was created to implement these regulations. Under the regulations, acknowledgment is granted to groups that demonstrate that they have a "substantially continuous tribal existence" and "have functioned as autonomous entities throughout history until the present."

BAR's primary mission is to process and evaluate petitions for acknowledgment. The BAR experts review and evaluate petitions', documentation, consult with petitioners and third parties, prepare technical assistance review letters, hold formal and informal technical assistance meetings, maintain petitions and administrative correspondence files, and make recommendations for proposed findings and final determinations to the Assistant Secretary for Indian Affairs (AS-IA). However, within the past 10 years, the BAR has found itself performing more extensive and time consuming administrative duties, including preparing administrative records in response to appeals and litigation, and the handling of extensive Freedom of Information Act (FOIA) requests on behalf of petitioners and interested parties. For example, the administrative record in *Ramapough Mountain Indians v. Norton* was 30,000 pages which had to be prepared and scanned onto 7 CD-ROMs. For the first half of 2002, over 84,000 pages had been

released under FOIA, and over 4,200 pages had been withheld deemed, after careful legal analysis, to be non-disclosable.

THE GAO REPORT

In November 2001, the General Accounting Office (GAO) issued its report, *Indian Issues: Improvements Needed in Tribal Recognition Process* (Report). The GAO recommended that Federal acknowledgment decisions be made in a more predictable and timely manner. On Page 14 of the report, the GAO stated "[b]ecause of limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, the length of time involved in reaching final decisions is substantial. The workload of BIA staff assigned to evaluate recognition decisions has increased while resources have declined." The current staff within the BAR consists of 11 full-time employees, which includes two new hires -- a genealogist who started work in May 2002 and an anthropologist who started work on June 3, 2002.

THE ACKNOWLEDGMENT WORKLOAD

There are currently 15 petitioners under active consideration, which make up the core of BAR's responsibilities and 8 petitioners ready, waiting for active consideration. Active consideration is the core responsibility of the BAR and includes the process from the time the BAR staff officially begins its review and evaluation of the petition, through the proposed finding and comment stage to the final determination. It may also include a reconsidered final determination, if requested by the Secretary of the Interior (Secretary) following review and referral by the Interior Board of Indian Appeals (IBIA).

The regulations require providing informal technical assistance to petitioners and third parties, which the BAR provides in meetings, telephone conferences, and formal letter. We held 68 meetings in 1999, 73 in 2000, and 60 in 2001. In addition, we issued 42 technical assistance letters during the 1995 to mid-2001 period

In 2001, the BAR held four recorded technical assistance meetings concerning the process at the request of petitioners and interested parties. The agenda for one on-the-record technical assistance meeting generated a transcript of 561 pages with indices. The planning, organizing, implementing and controlling of these formal technical assistance meetings requires substantial research and administrative time and commitment of resources.

The BAR also responds on a priority basis to inquiries from members of Congress, provides technical comments on proposed legislation relating to the acknowledgment of tribal status generally or relating to the acknowledgment of the tribal status of specific groups of Indian descendants, and responds to extensive requests under the FOIA for information relating to a petitioner.

The most time consuming diversion of BAR researchers from their primary responsibility of evaluating petitions, is responding to requests for copies of documents under FOIA. To satisfy the acknowledgment regulations, petitioners submit a large and varied body of documentation which includes a substantial amount of genealogical and other personal information. Initial petion submissions commonly range from

25,000 to 100,000 pages. Responses to proposed findings may entail an equally extensive amount of documentation. To avoid violating the Privacy Act, the BAR must make a detailed, page-by-page, line-by-line review of all documents to redact sensitive information prior to public disclosure. Over the 1991 through mid-2001 period, we responded to 396 requests, copied and released 219,100 pages, withheld 12,966 pages, and redacted 1,426 pages. This year, BAR is responding to multiple FOIA requests for the two Nipmuck acknowledgment petitions. The Department to date has released 59,021 pages and withheld 12,703 pages.

THE LITIGATION

The BAR assists the Office of the Solicitor and the Department of Justice, in responding to litigation. When faced with litigation regarding the process or timing in which a petition has been handled, the Department ordinarily asserts that the Courts lack jurisdiction to become involved in the regulatory process until a final determination is made. However, in many of the cases below, Courts have nonetheless injected themselves into the process, and have required the Department to abide by specific schedules or keep the Court updated on progress on projected timelines. Pending lawsuites include: (1) *Connecticut v. Department of the Interior,* Civil No. 3:01CV-0088(AVC), D. Conn. (2) *United States v. 43.47 Acres of Land,* Civil No. H-85-1078 (PCD), D. Conn.; (3) *Muwekma Tribe v. Babbitt* , Civil No. 99-CV-3261 (RMU), D.D.C.; (4) *Burt Lake v. Norton*, Civil No. 1:01CV00703, D. D.C. ; (5) *Golden Hill Paugussett Tribe v. Norton*, Civil No. 3:01CV1448 (JBA), D. Conn.; and (6) the *Mashpee Wampanoag Council, Inc. v. Norton,* No. 1:01CV00111 (JR), D.D.C. Also, we just successfully defended two acknowledgment decisions in the 7th Circuit and the D.C. Circuit - *Miami Nation of Indians of Indiana v. the Department of the Interior* (petition for certiorari denied) and *Ramapough Mountain Indians v. Norton* (petition for certiorari pending). The Seventh Circuit in the *Indiana Miami* case also affirmed the Department's authority to acknowledge tribes and affirmed the validity of the acknowledgment regulations. Additionally, we successfully defended a challenge to the requirement of exhaustion of the administrative process. *United Tribe of Shawnee Indians v. United States* (10th Circuit).

The Department is working on several Court approved timelines and Court ordered deadlines. Each negotiated schedule is a result of unique circumstances, such as the Schaghticoke Tribal Nation's ("Schaghticoke") acknowledgment petition, a condemnation action that had been pending since 1985. See *United States v. 43.47 Acres of Land,* Civil No. H-85-1078 (PCD), D. Conn. As a pilot project to speed the acknowledgment process, three technicians inputed data from the petition into an automated database that will be accessible to BAR researchers, petitioners, and interested parties. This demonstration project, if successful, will provide a decision that is more readily transparent and verifiable, and will provide a more efficient decision making process, as recommended by GAO.

Projected schedules for processing and evaluating the petitions of the following groups on active consideration are established by immediate regulatory deadlines, court approved settlement agreements, and court orders:

- Petitioners with projected regulatory schedules include the: Chinook Indian Tribe/Chinook Nation (#57) (Washington).

- Petitioners with court approved projected schedules include the: Eastern Pequot Indians of Connecticut (#35), Paucatuck Eastern Pequot Indians of Connecticut (#115), and the Golden Hill Paugussett Tribe (#81), the Schaghticoke Tribal Nation (#79) (Connecticut).
- Petitioners with court ordered schedules include the: Muwekma Indian Tribe (#111) and Masphee Wampanoag (#15) (California and Massachusetts respectively).

There are six other petitioners on active consideration awaiting the availability of a BAR research team to complete the evaluation and processing of their acknowledgment petition.

THE IMPACT OF LITIGATION

Court orders impact other petitioners in the process and preempt the ability of the Department to manage the acknowledgment program and its resources on a uniform and equitable basis. They impact: i) the petitioner; ii) the interested parties; iii) the general public; iv) the nature and quality of the review of the petition; v) those petitioners on active consideration; vi) those petitioners with higher priority on the ready list; and vii) the ability of the Department to manage the acknowledgment program and its resources.

By requiring the Department to give priority to one petition over another, court orders have forced us to divert limited resources. Based upon our experience, our adherence to the Court orders has interrupted, delayed, and adversely impacted the petitioners currently on active consideration and those who are high on the ready list and entitled to priority in consideration over petitioners under Court orders.

Court orders also adversely impact interested parties and the petitioners themselves. The interested parties identified with a specific petition include the states, states Attorneys General, surrounding towns, and recognized tribes. Certain court orders require the Department to prioritize petitions and truncate the time-frames in the regulations for interested parties and petitioners to submit comments on the proposed finding and to receive technical assistance. Court orders abbreviate the time period for responding to comments and accelerate the completion of the proposed findings and final determinations.

In the Mashpee litigation, the Department informed the Court that "[t]he lack of staff and truncated evaluation times will result in a proposed finding for the Mashpee petitioner that will differ substantially in both form and content from the proposed findings of petitions already processed and evaluated under the 1994 regulations." For instance, in Mashpee the proposed finding scheduled to be issued this year, does not have a cultural anthropologist assigned to its research team, as the existing cultural anthropologists were already assigned to other cases with court schedules.

Finally, court imposed deadlines can be unrealistic. In Muwekma and in the Connecticut cases, the petitioners and interested parties have requested extensions from the court because they were unable to meet the shortened deadlines. Typically, the petitioner, interested parties, and other parties submit FOIA requests to the Department for copies of records, such as petition materials and BAR research documents that they will use to comment meaningfully on the proposed finding. Because the requested records are often extensive, the six (6) months provided for the comment period is barely long enough for the

Department to review for privacy concerns and release the requested records, for the requesters to receive and review the records, and for the requesters to analyze these records and submit comments to the Department on the proposed finding. Due to these logistical factors, it is likely that the interested parties and the petitioner will need to request extensions of the comment period to obtain time for receiving and analyzing requested copies of records for the purpose of adequately responding to the proposed finding.

CONCLUSION

Thank you for the opportunity to testify on this issue. We will be happy to answer any questions you may have concerning the Federal acknowledgment process.